Supreme Court, U.S.
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No. 03-1230

In the Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., AND USF HOLLAND, INC.,

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the Michigan Court of Appeals

PETITIONERS' REPLY BRIEF

ROBERT DIGGES, JR.
ATA Litigation Center
2200 Mill Road
Alexandria, VA 22314
(703) 838-1865

CHARLES ROTHFELD
Counsel of Record
EVAN TAGER
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

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PETITIONERS' REPLY BRIEF

Respondents' brief in opposition has virtually nothing to say about the principal issues in this case. Respondents make no effort to defend the central elements of the decision below. They are unable – and in most cases do not even attempt – to distinguish the conflicting decisions by this and other courts. And they offer no reason to doubt that the rule embraced by the Michigan court will lead to the imposition of unacceptable burdens on interstate commerce. Review by this Court accordingly is in order.

A. The Michigan Court's Approach To The Commerce Clause Apportionment Requirement Departs From The Holdings Of This And Other Courts And Will Lead To The Imposition Of Multiple Burdens On Interstate Commerce

1. In the petition, we argued at length that the Michigan court erred in holding that a flat tax on participants in interstate commerce is not subject to the Commerce Clause requirement of fair apportionment so long as the levy is labeled a "regulatory fee." See Pet. 7-17. The State's brief opposing the petition asserts, halfheartedly, that this decision was correct. Br. in Opp. 14-15. But respondents make literally *no* attempt to defend the holding that states may evade the apportionment requirement through the simple expedient of dubbing their levies "regulatory fees." Respondents do not explain how the analysis used below can be reconciled with this Court's decisions; do not try to square that analysis with controlling Commerce Clause principles; and do not deny that the rule of law stated by the Michigan court will lead to the imposition of duplicative burdens on interstate commerce. For this reason alone, the decision below – which also exacerbates a conflict among state courts of last resort

and federal courts of appeals regarding the relevance of the "regulatory fee" label[1] – warrants this Court's review.

2. Rather than defend the rule actually announced and applied by the Michigan court, respondents attempt to justify the malapportionment of the Michigan tax on a variety of grounds that were *not* embraced by the court below. All of these makeweight arguments, however, are insubstantial – and they should not succeed in camouflaging either the significant error of law committed by the Michigan court or the invalidity of the Michigan tax.

a. Respondents' principal contention is that, because the Michigan tax is triggered by the carriage of goods intrastate, the levy should be deemed internally consistent; they reason that, if every state adopted an identical tax, "[e]ach state could charge a fee or tax for intrastate operations and be properly apportioned and internally consistent because the burden is on intrastate commerce and not interstate commerce." Br. in Opp. 18; see *id.* at 17 ("no multiple taxation violating the Commerce Clause would result for the reason

[1] As we explained in the petition (at 17-20), lower courts are in conflict on the question whether state levies should escape the apportionment requirement when they are designated "regulatory fees." Respondents attempt to minimize the conflict by asserting that the states in those cases were "levying a charge to engage in interstate commerce within the boundaries of their states." Br. in Opp. 25. That assertion is wrong as a factual matter; the fees invalidated in the conflicting decisions were imposed on the in-state transportation of hazardous materials, not on "engag[ing] in interstate commerce." See *American Trucking Ass'ns, Inc.* v. *Secretary of State*, 595 A.2d 1014, 1014 (Me. 1991); *American Trucking Ass'ns, Inc.* v. *Secretary of Admin.*, 613 N.E.2d 95, 99 (Mass. 1993). Respondents also miss the more fundamental point: the courts in those cases held that regulatory fees *are* subject to the apportionment requirement (see Pet. 18-19), while the Michigan court in this case held just the opposite.

that each separate state would only be charging for intrastate operations in that same state"). But this argument rests on an obvious fallacy. In fact, the Court has "long since rejected any suggestion that a state tax or regulation affecting interstate commerce is immune from Commerce Clause scrutiny because it attaches only to a 'local' or intrastate activity." *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 615 (1981) (citing cases). Instead, as we noted in the petition (at 13 n.8), the apportionment and other *Complete Auto* requirements must be satisfied whenever "a 'local activity' * * * substantially affect[s] interstate commerce." *Commonwealth Edison*, 453 U.S. at 616-617. "Even when business activities are purely local, if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 573 (1997) (citations and internal quotation marks omitted).

This point is made clear by *Scheiner* itself. There, Pennsylvania imposed an unapportioned tax on carriers "for the privilege of using [the] State's highway system." 483 U.S. at 269. That tax could have been defended on precisely the ground advanced by respondents here: just as no other state may tax intrastate carriage in Michigan, no other state could have imposed a levy on the intrastate use of Pennsylvania's highways. See *id.* at 293-294. But the Court nevertheless held the Pennsylvania tax invalid because unapportioned levies like Pennsylvania's, if imposed by other states on the (assertedly intrastate) use of *their* highways, would result in cumulative burdens on interstate commerce, placing interstate truckers at a potentially crippling competitive disadvantage. See *id.* at 284, 296. Respondents do not, and could not, deny that Michigan's unapportioned tax has exactly the same effect. See Pet. 9-11. And for purposes of Commerce Clause

analysis, it is simply immaterial that this "pinch" on interstate commerce is triggered by an intrastate event.[2]

b. Respondents also appear to argue that a claim of malapportionment cannot succeed because there has been no showing that the business decisions of interstate truckers actually were affected by the flat Michigan tax. Br. in Opp. 7-10. But this Court has made quite clear that no such empirical showing is required. To the contrary, the internal consistency test used to assess the fairness of apportionment "asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a competitive disadvantage as compared with commerce intrastate. A failure of internal consistency shows *as a matter of law* that a State is attempting to take more than its fair share of taxes." *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995) (emphasis added).[3]

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[2] For this reason, respondents' attempt to distinguish *Scheiner* on the ground that "Michigan's fees cannot result in multiple fees for interstate transportation" (Br. in Opp. 23) is unavailing. Indeed, as we explained in the petition (at 11-12), the practical impediments to interstate commerce imposed by the Michigan tax are considerably greater than those of the Pennsylvania tax invalidated in *Scheiner*; the Michigan levy effectively punishes interstate truckers who choose to compete with Michigan carriers for in-state business and thus has an obvious protectionist effect. Respondents make no response to this point.

[3] Respondents' reliance on *Jefferson Lines* (at Br. in Opp. 17-19) thus demonstrates their misunderstanding of the apportionment requirement and the internal consistency test. The Oklahoma tax at issue in *Jefferson Lines* was imposed on the sale of bus tickets for travel interstate; the Court upheld the tax because, "[i]f every State were to impose a tax identical to Oklahoma's, that is, a tax on ticket sales within the State for travel originating there," multiple

Thus, as one court recently noted, "[t]he internal consistency test * * * does not look at the actual effect of a tax on interstate commerce but at whether it would, in theory, place interstate commerce at a disadvantage if all states adopted the identical tax"; "the [Supreme] Court has * * * made it clear that it is the inherent tendency of a tax, not the effects that the tax has actually produced, that matters for the 'internal consistency' test." *American Trucking Ass'ns, Inc.* v. *Oregon*, 2004 Ore. App. LEXIS 539, at *12, *21 (Ore. Ct. App. Apr. 29, 2004). See also, *e.g.*, *American Trucking Ass'ns, Inc.* v. *Secretary of State*, 595 A.2d 1014 (Me. 1991); *American Trucking Ass'ns, Inc.* v. *Secretary of Admin.*, 613 N.E.2d 95 (Mass. 1993). Although we made this point in the petition (at 8), respondents offer no response.

Moreover, in upholding claims that state taxes or regulations violate the Commerce Clause's anti-discrimination requirement, the Court has expressly *rejected* the contention that the plaintiff must show an actual adverse effect on interstate commerce. Thus, "[a] particularized showing of the sort respondent[s] seek[] is not required" (*Camps Newfound/Owatonna*, 520 U.S. at 581 n.15), and that is so even if the affected entities "are not deterred by the statute from doing a principally interstate business." *Id.* at 578. See, *e.g.*, *Fulton Corp.* v. *Faulkner*, 516 U.S. 352, 333 & n.3 (1996); *Bacchus Imports, Ltd* v. *Dias*, 468 U.S. 263, 271 (1984). Although we also made this point in the petition (at 21-23), re-

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burdens would not be placed on interstate commerce. 514 U.S. at 185; see *id.* at 186-191. The opposite is true of the Michigan tax. By the same token, the Michigan registration fee on vehicles plated in the State that is mentioned by respondents (Br. in Opp. 17 n.5, citing MCL § 478.2(2)) is not problematic because such registration fees, if imposed by every state on vehicles that it registers, would not adversely affect interstate commerce.

spondents again neither attempt to distinguish the relevant decisions nor make any other response.

c. Finally, respondents are wrong in their contention (at Br. in Opp. 23-24) that fair apportionment of the Michigan tax would be impractical and therefore is unnecessary. As the Court said in rejecting an identical argument in *Scheiner*, "[t]he administrative machinery of revenue collection for highways is now obviously capable of taking into account at least gross variations in the cost per unit of highway usage." 483 U.S. at 297. Michigan is perfectly capable of taking such variations into account when imposing a tax, like the one at issue here, that falls on the annual operation of a truck that travels in the State; indeed, Michigan bases various of its other highway levies, such as vehicle registration fees and fuel taxes, on mileage traveled. See MCL § 257.801g (registration); § 207.101 (fuel). Compare *Scheiner*, 483 U.S. at 297 (Pennsylvania had practical alternatives to flat tax because it apportioned other levies according to "total miles traveled in the State"). In saying this, we do not argue, as respondents would have it, that a tax must "precisely offset the benefits that each person derives from the government." Br. in Opp. 24. But as *Scheiner* explained, a highway levy must be "'based on some fair approximation of use or privilege for use.'" 483 U.S. at 289 (citation omitted). Respondents do not, and could not, claim that unapportioned taxes like Michigan's satisfy that test.

B. The Michigan Tax Discriminates Against Interstate Commerce

As we argued in the petition (at 20-23), the Michigan court also misunderstood the Commerce Clause anti-discrimination requirement. The court held that a constitutional violation could not be made out absent proof that a particular carrier's "economic decision-making" had been affected by the flat tax. Pet. App. 28a. Respondents endorse

that position, contending that the claim of discrimination here should fail because "Petitioners failed to present evidence demonstrating the discriminatory nature of the $100 fee." Br. in Opp. 12. See *id.* at 12-14, 19-20.

As we showed in the petition (at 21-22), however, the Court has held that flat taxes *necessarily* discriminate against interstate commerce: "the very difference between interstate and local trade, taken in conjunction with the inherent character of the tax, makes equality of application between those two classes of commerce, generally speaking, impossible." *Nippert* v. *City of Richmond*, 327 U.S. 416, 432 (1946). See *Scheiner*, 483 U.S. at 284 n.16, 291. Respondents make no effort to distinguish *Nippert*, *Scheiner*, or the many other decisions cited in the petition that stand for this proposition – and they do not even attempt to show how the Michigan tax can survive application of this principle. In addition, as we argued in the petition (at 23) and discuss above (at 5-6), the Court has held that, when structural discrimination is present, proof of discriminatory effect is unnecessary to make out a violation of the Commerce Clause. Again, respondents have nothing to say on this point.[4]

Respondents do assert that the Michigan tax does not discriminate against interstate commerce because "[t]he motor carrier chooses where it will conduct business" and makes its own "selection of those vehicles it designates as being util-

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[4] Respondents may mean to argue that Michigan law requires "proof of specific facts" establishing discrimination and that the absence of such evidence provides an independent state ground for the decision below. Br. in Opp. 9-10. If this is respondents' contention, it is wholly without merit. Needless to say, a state court may not rely on a state-law ground for decision that is itself inconsistent with the federal Constitution. In fact, the relevant part of the decision below turned exclusively on the Michigan court's reading of the Commerce Clause. See Pet. App. 28a-32a.

ized for intrastate transportation." Br. in Opp. 20. It is the very purpose of the Commerce Clause, however, to ensure that states do not impose special burdens on companies that choose to conduct business across state lines. And respondents are wrong if they mean to contend that carriers may escape the burdens of the flat Michigan tax by dedicating certain of their trucks exclusively to intrastate commerce. Such a course is not possible as a practical matter (see Pet. 12 n.7) – and even if it were, a state may not "force a taxpayer" to restructure its operations or conduct a higher percentage of its business in-state "in order to avoid discriminatory taxation." *Kraft General Foods, Inc.* v. *Iowa Dept. of Rev. & Fin.*, 505 U.S. 71, 78 (1992). See Pet. 12 n.7 (citing cases).

C. The Issues Presented Here Are Important Ones That Should Be Reviewed By This Court

Given the distracting goulash of arguments advanced by respondents, it is important not to lose sight of the central issues actually presented by this case. The Michigan court's holding that regulatory fees are not subject to the apportionment requirement carves a large loophole in an essential Commerce Clause protection. As we showed in the petition (at 24-26), the rule stated by the court below is applicable to a wide range of legislation in many states, arises with considerable frequency, exacerbates a conflict in the lower courts, and places state officials in doubt about their taxing authority. By the same token, the Michigan court's holding that the anti-discrimination principle comes into play only when there is quantifiable proof of an adverse impact on interstate commerce injects considerable confusion into Commerce Clause litigation and often will make it impossible to challenge state levies that burden interstate businesses. Because these issues are recurring ones of considerable practical importance (a point confirmed by the broad *amicus* support for the petition)[5] – and because the rules now governing taxation in Michigan cannot be squared with federal constitutional requirements – review by this Court is in order.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari to the Michigan Court of Appeals should be granted.

Respectfully submitted.

ROBERT DIGGES, JR.
ATA Litigation Center
2200 Mill Road
Alexandria, VA 22314
(703) 838-1865

CHARLES ROTHFELD
Counsel of Record
EVAN TAGER
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

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[5] Respondents also are wrong in asserting that there is no evidence in the record regarding the amount at stake in this litigation. An affidavit appended to respondents' brief in opposition itself indicates that almost $3 million was collected under the Michigan tax in 1994 alone. Br. in Op. 23b, ¶ 15. Because ten years of tax receipts are now at issue in this suit, it is apparent that at least $30 million (plus many years' interest) is at stake.